ALASKA STATE LEGISLATURE
SENATE JUDICIARY STANDING COMMITTEE
February 9, 2022
1:34 p.m.

MEMBERS PRESENT

Senator Roger Holland, Chair
Senator Shelley Hughes
Senator Robert Myers (via Teams)
Senator Jesse Kiehl

MEMBERS ABSENT

Senator Mike Shower, Vice Chair

COMMITTEE CALENDAR

SENATE BILL NO. 119
"An Act relating to oaths of office; and requiring public officers to read the state constitution, the Declaration of Independence, and the United States Constitution."

- BILL HEARING POSTPONED TO FEBRUARY 11, 2022

HOUSE BILL NO. 155
"An Act relating to court-appointed visitors and experts; relating to the powers and duties of the office of public advocacy; relating to the powers and duties of the Alaska Court System; and providing for an effective date."

- MOVED SCS HB 155(JUD) OUT OF COMMITTEE

SENATE BILL NO. 129
"An Act relating to information on judicial officers provided in election pamphlets."

- HEARD & HELD

SENATE BILL NO. 23
"An Act relating to proposing and enacting laws by initiative."

- HEARD & HELD

PREVIOUS COMMITTEE ACTION

BILL: HB 155
SHORT TITLE: COURT SYSTEM PROVIDE VISITORS & EXPERTS
SPONSOR(s): REPRESENTATIVE(s) TUCK

03/29/21	(H)	READ THE FIRST TIME - REFERRALS
03/29/21	(H)	JUD, FIN
04/05/21	(H)	JUD AT 1:00 PM GRUENBERG 120
04/05/21	(H)	Heard & Held
04/05/21	(H)	MINUTE(JUD)
04/07/21	(H)	JUD AT 1:00 PM GRUENBERG 120
04/07/21	(H)	Moved HB 155 Out of Committee
04/07/21	(H)	MINUTE(JUD)
04/09/21	(H)	JUD RPT 4DP 3NR
04/09/21	(H)	DP: KREISS-TOMKINS, DRUMMOND, SNYDER, CLAMAN
04/09/21	(H)	NR: EASTMAN, VANCE, KURKA
05/05/21	(H)	FIN AT 9:00 AM ADAMS 519
05/05/21	(H)	Heard & Held
05/05/21	(H)	MINUTE(FIN)
05/06/21	(H)	FIN AT 1:30 PM ADAMS 519
05/06/21	(H)	Moved HB 155 Out of Committee
05/06/21	(H)	MINUTE(FIN)
05/07/21	(H)	FIN RPT 7DP 2NR
05/07/21	(H)	DP: ORTIZ, EDGMON, LEBON, THOMPSON, WOOL, JOSEPHSON, MERRICK
05/07/21	(H)	NR: CARPENTER, RASMUSSEN
05/13/21	(H)	TRANSMITTED TO (S)
05/13/21	(H)	VERSION: HB 155
05/14/21	(S)	READ THE FIRST TIME - REFERRALS
05/14/21	(S)	JUD, FIN
01/28/22	(S)	JUD AT 1:30 PM BUTROVICH 205
01/28/22	(S)	Scheduled but Not Heard
01/31/22	(S)	JUD AT 1:30 PM BUTROVICH 205
01/31/22	(S)	Heard & Held
01/31/22	(S)	MINUTE(JUD)
02/02/22	(S)	JUD AT 1:30 PM BUTROVICH 205
02/02/22	(S)	Heard & Held
02/02/22	(S)	MINUTE(JUD)
02/09/22	(S)	JUD AT 1:30 PM BUTROVICH 205

BILL: SB 129
SHORT TITLE: ELECTION PAMPHLET INFORMATION RE: JUDGES
SPONSOR(s): SENATOR(s) MYERS

04/21/21	(S)	READ THE FIRST TIME - REFERRALS
04/21/21	(S)	JUD, STA

05/05/21	(S)	JUD AT 1:30 PM BUTROVICH 205
05/05/21	(S)	Heard & Held
05/05/21	(S)	MINUTE(JUD)
05/12/21	(S)	JUD AT 1:30 PM BUTROVICH 205
05/12/21	(S)	Scheduled but Not Heard
05/14/21	(S)	JUD AT 1:30 PM BUTROVICH 205
05/14/21	(S)	-- MEETING CANCELED --
01/28/22	(S)	JUD AT 1:30 PM BUTROVICH 205
01/28/22	(S)	Heard & Held
01/28/22	(S)	MINUTE(JUD)
01/31/22	(S)	JUD AT 1:30 PM BUTROVICH 205
01/31/22	(S)	Scheduled but Not Heard
02/02/22	(S)	JUD AT 1:30 PM BUTROVICH 205
02/02/22	(S)	Heard & Held
02/02/22	(S)	MINUTE(JUD)
02/09/22	(S)	JUD AT 1:30 PM BUTROVICH 205

BILL: SB 23
SHORT TITLE: INITIATIVE SEVERABILITY
SPONSOR(s): SENATOR(s) REVAK

01/22/21	(S)	PREFILE RELEASED 1/8/21
01/22/21	(S)	READ THE FIRST TIME - REFERRALS
01/22/21	(S)	STA, JUD
03/09/21	(S)	STA AT 3:30 PM BUTROVICH 205
03/09/21	(S)	Heard & Held
03/09/21	(S)	MINUTE(STA)
04/13/21	(S)	STA AT 3:30 PM BUTROVICH 205
04/13/21	(S)	Moved SB 23 Out of Committee
04/13/21	(S)	MINUTE(STA)
04/14/21	(S)	STA RPT 1DP 1DNP 3NR
04/14/21	(S)	NR: SHOWER, REINBOLD, HOLLAND
04/14/21	(S)	DP: COSTELLO
04/14/21	(S)	DNP: KAWASAKI
04/19/21	(S)	JUD AT 1:30 PM BUTROVICH 205
04/19/21	(S)	Heard & Held
04/19/21	(S)	MINUTE(JUD)
04/21/21	(S)	JUD AT 1:30 PM BUTROVICH 205
04/21/21	(S)	<Bill Hearing Canceled>
02/09/22	(S)	JUD AT 1:30 PM BUTROVICH 205

WITNESS REGISTER

MICHAEL MASON, Staff
Representative Chris Tuck
Alaska State Legislature

Juneau, Alaska
POSITION STATEMENT: Made closing remarks on behalf of the sponsor of HB 155.

REPRESENTATIVE CHRIS TUCK
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: Sponsor of HB 155.

SUSANNE DIPIETRO, Executive Director
Alaska Judicial Council (AJC)
Alaska Court System
Anchorage, Alaska
POSITION STATEMENT: Answered questions and explained amendments to SB 129.

NANCY MEADE, General Counsel
Administrative Offices
Alaska Court System
Anchorage, Alaska
POSITION STATEMENT: Answered questions during the discussion of SB 129.

SENATOR JOSH REVAK
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: Testified as sponsor of SB 23.

ERIC FJELSTAD, Attorney; Partner
Perkins Coie, LLP
Anchorage, Alaska
POSITION STATEMENT: Answered questions on constitutional issues during the hearing on SB 23.

NOAH KLEIN, Attorney
Legislative Legal Counsel
Legislative Legal Services
Legislative Affairs Agency
Juneau, Alaska
POSITION STATEMENT: Answered legal questions on SB 23.

ACTION NARRATIVE

1:34:20 PM
CHAIR ROGER HOLLAND called the Senate Judiciary Standing Committee meeting to order at 1:34 p.m. Present at the call to

order were Senators Kiehl, Myers (via Teams), Hughes, and Chair Holland.

HB 155-COURT SYSTEM PROVIDE VISITORS & EXPERTS

1:35:14 PM
CHAIR HOLLAND announced the consideration of HOUSE BILL NO. 155 "An Act relating to court-appointed visitors and experts; relating to the powers and duties of the office of public advocacy; relating to the powers and duties of the Alaska Court System; and providing for an effective date."

[HB 155 was previously heard on 1/31/2022 and 2/2/2022. Public testimony was opened and closed on 2/22/2022.]

CHAIR HOLLAND turned to amendments on HB 155.

1:35:40 PM
SENATOR KIEHL moved to adopt Amendment 1, work order 32-LS0698\B.1.

32-LS0698\B.1
Radford
2/3/22

AMENDMENT 1

OFFERED IN THE SENATE BY SENATOR KIEHL

Page 4, line 21:
Following "to":
Insert "the provision of visitors and experts in"
Following "and":
Insert "the provision of visitors in"

Page 4, line 22:
Delete "commenced"

Page 4, line 24:
Following "provide":
Insert "for the services of"
Following the second occurrence of "and":
Insert "for the services of"

Page 4, line 25:

Delete "that were commenced"

CHAIR HOLLAND objected for discussion purposes.

1:35:50 PM
SENATOR KIEHL explained that Amendment 1 would provide a smooth transfer of the Court Visitor Program from the Office of Public Advocacy (OPA) to the Alaska Court System. Amendment 1 would allow the agencies to hand off cases on the bill's effective date, so both agencies would not be carrying the cases.

1:36:43 PM
MICHAEL MASON, Staff, Representative Chris Tuck, Alaska State Legislature, Juneau, Alaska, on behalf of the sponsor, said the sponsor has no objection to Amendment 1.

1:36:58 PM
CHAIR HOLLAND removed his objection. There being no further objection, Amendment 1 was adopted.

1:37:07 PM
SENATOR KIEHL moved to adopt Amendment 2, work order 32-LS0698\B.2.

32-LS0698\B.2
Radford
2/4/22

AMENDMENT 2

OFFERED IN THE SENATE BY SENATOR KIEHL

Page 4, line 29:
Delete "2021"
Insert "2022"

CHAIR HOLLAND objected for discussion purposes.

1:37:18 PM
SENATOR KIEHL explained that Amendment 2 would update the effective date of the bill.

1:37:30 PM
CHAIR HOLLAND removed his objection. He heard no further objection, and Amendment 2 was adopted.

1:37:47 PM
MICHAEL MASON, Staff, Representative Chris Tuck, Alaska State legislature, Juneau, Alaska made closing remarks on behalf of the sponsor. He stated that HB 155 was a collaborative effort between the three branches of government. He said the sponsor appreciated the committee's work on the bill.

1:38:09 PM
SENATOR HUGHES asked if the court visitors' clients were supportive of the bill. She asked if the sponsor had heard from any of the senior groups on HB 155 since many seniors use court visitors.

MR. MASON stated that the sponsor solicited comments from several organizations and did not receive any negative comments. He deferred to Mr. Wooliver or Office of Public Advocacy (OPA) to respond.

1:39:05 PM
SENATOR HUGHES commented that she was glad to hear there was no opposition. She said she was comfortable with HB 155.

1:39:28 PM
CHAIR HOLLAND recognized Representative Tuck.

1:39:37 PM
REPRESENTATIVE CHRIS TUCK, Alaska State Legislature, Juneau, Alaska, speaking as sponsor of HB 155, thanked the committee for considering the bill. He characterized HB 155 as a clean-up bill that will make the Court Visitor Program run more smoothly and efficiently.

1:40:10 PM
SENATOR HUGHES moved to report HB 155, work order 32-LS0698\B as amended, from committee with individual recommendations and attached fiscal note(s).

CHAIR HOLLAND found no objection, and SCS HB 155(JUD) was reported from the Senate Judiciary Standing Committee.

1:40:34 PM
At ease

SB 129-ELECTION PAMPHLET INFORMATION RE: JUDGES

1:41:57 PM

CHAIR HOLLAND reconvened the meeting and announced the consideration of SENATE BILL NO. 129 "An Act relating to information on judicial officers provided in election pamphlets."

[SB 129 was previously heard on 5/5/21, 1/28/22, and 2/2/2022. [Public testimony was opened and closed, and a committee substitute (CS) for SB 129, Version O, was adopted on 1/28/22].

1:42:43 PM
CHAIR HOLLAND stated that the committee would take up amendments. He said he intended to hold the bill in committee.

1:42:59 PM
CHAIR HOLLAND moved to adopt Amendment 1, work order 32-LS0751\O.2.

32-LS0751\O.2
Radford
2/1/22

AMENDMENT 1

OFFERED IN THE SENATE BY SENATOR HOLLAND
TO: CSSB 129(JUD), Draft Version "O"

Page 2, line 10, following "**a**":
Insert "**superior court judge or district court**"

Page 2, line 31:
Delete "**justice**"
Insert "**supreme court justice or court of appeals judge**"

1:43:03 PM
SENATOR HUGHES objected for discussion purposes.

CHAIR HOLLAND asked Ms. DiPietro to explain Amendment 1.

1:43:15 PM
SUSANNE DIPIETRO, Executive Director, Alaska Judicial Council (AJC), Alaska Court System, Anchorage, Alaska, explained that Amendment 1 would differentiate between the information AJC would provide for trial and district court judges. She said it specifically related to performance evaluations for appellate

judges, which includes the Supreme Court justices or Court of Appeals judges.

1:44:03 PM
SENATOR HUGHES asked whether this was for clarification or if it would change policy.

MS. DIPIETRO replied that the proposed committee substitute (CS) for SB 129, Version O identified the information AJC will provide for all judges, including appellate judges. However, AJC does not collect some information for appellate judges since their jobs are slightly different from trial court judges. Thus, the council's evaluation of the two different levels of courts is slightly different. AJC wanted to be clear the information provided on trial court judges was slightly different from appellate court judges. She summarized that the language in Version O was not applicable because it treats both levels of judges the same.

1:45:58 PM
SENATOR MYERS, via Teams, speaking as sponsor, related that he had discussed Amendment 1 with Ms. DiPietro. He remarked that he had intended to make this change, so he is comfortable with it. He characterized Amendment 1 as providing clarifying language.

1:46:52 PM
SENATOR HUGHES removed her objection.

CHAIR HOLLAND found no further objection, and Amendment 1 was adopted.

1:47:07 PM
CHAIR HOLLAND moved to adopt Amendment 2, work order 32-LS0751\O.6.

32-LS0751\O.6
Radford
2/4/22

AMENDMENT 2

OFFERED IN THE SENATE BY SENATOR HOLLAND
TO: CSSB 129(JUD), Draft Version "O"

Page 2, lines 21 - 22:
Delete all material and insert:

"**(F) the number of decisions by the judge that were reviewed and disposed of by a written decision of an appellate court, the percentage of issues in those decisions that were affirmed by the appellate court, and the significance of the affirmation rate based on the type of case appealed, historical statewide averages, affirmance data from similarly situated judges, and other relevant factors;**"

SENATOR HUGHES objected for discussion purposes.

1:47:21 PM
MS. DIPIETRO explained that Amendment 2 would clarify the information presented on judicial decisions issued by trial court judges. She explained that the appellate court reviews the outcome of judicial decisions that are appealed, which is referred to as the affirmance rate. She explained the process. Judicial decisions made by trial court judges can be appealed to the Court of Appeals or the Alaska Supreme Court. Once cases are appealed and the appellate courts issue their decisions, the Alaska Judicial Council analyzes and catalogs each decision as to whether it was affirmed, partially affirmed, mostly affirmed, or mostly reversed. For example, if a trial court judge had 10 cases appealed and the appellate court affirmed 2 but reversed 8 cases, it would result in a 20 percent affirmance rate. The calculation and analysis for each trial court judge whose cases were appealed to the higher court are posted to AJC's website.

MS. DIPIETRO related her understanding that subparagraph (F) describes the type of information on affirmance rate that would be provided in the voter pamphlet. However, AJC's analysis is complex, typically 10-15 pages in length, providing context and information. Due to the complexity and length, this analysis is not currently inserted in the voter pamphlet. Instead, AJC provides a summary and directs those seeking the in-depth analysis to AJC's website.

1:49:53 PM
SENATOR HUGHES asked whether the sponsor would comment on Amendment 2.

1:49:59 PM
SENATOR MYERS said he supported the first half of Amendment 2, which he viewed as clarifying language. However, he was unsure about the second part of Amendment 2 related to the affirmance rate. He pointed out that AJC currently provides survey

information on judges in the voter pamphlet. The language explaining the affirmance rate provides the same 3 to 5 sentences for each judicial candidate. Since space for each judicial candidate is currently limited to one page, he expressed concern that the remaining space would not allow for other pertinent information about judicial candidates.

1:51:53 PM
NANCY MEADE, General Counsel, Administrative Offices, Alaska Court System, Anchorage, Alaska, related her understanding that the committee had questions on the data that the court system retains. She said the court system could provide the data that AJC needs for the first portion of Amendment 2 through line 6. Regarding the affirmance rate, which is causing some concern for the sponsor, she suggested it might be possible to find some middle ground. She suggested that the language might be worded "with appropriate context to make this meaningful to voters" or some other phrase to ensure the information the sponsor wanted is provided yet allows some leeway for AJC to publish information to inform voters but not overwhelm them.

1:52:56 PM
SENATOR HUGHES asked whether the court system could develop some suggested language for the committee's review. She acknowledged that space in the voter pamphlet was limited. She was unsure of the length of the affirmance rate language, whether it would be one sentence, the same language for each judge, or vary based on the affirmance rate. For example, she said if the judge's affirmance rate was 20 percent, it might say something different than if it was 80 percent.

1:53:55 PM
MS. DIPIETRO indicated AJC's goal was to provide the information in the most meaningful way for voters, which she believed was also the sponsor's goal. She referred to the second part of Amendment 2, beginning on line 6, and indicated that the goal was to provide context on the affirmance rate. For example, a judge may have an affirmance rate of 77 percent, but without context it might be difficult for voters to assess whether that was a good or bad rate, so AJC would want to explain that 77 percent meets performance standards or is well within the range of the affirmance rates of other similarly situated judges and historical records. She stated she intended to craft the contextual language differently for each situation to be most meaningful for voters.

1:55:23 PM

At ease

1:55:45 PM
CHAIR HOLLAND reconvened the meeting

1:55:55 PM
SENATOR MYERS responded that he hoped voters would obtain context from comparing the information on the judges up for retention. He noted that typically more than 1 to 2 judges are up for retention for each election. He recalled that 6-8 judges were up for retention in the Fairbanks area at the last election. He surmised voters could review the pamphlet and compare the judges' affirmance rate. If most were in the 75 percent range, but one judge had a 53 percent affirmance, that judge would be the apparent outlier.

1:56:56 PM
CHAIR HOLLAND withdrew Amendment 2.

1:57:13 PM
CHAIR HOLLAND moved to adopt Amendment 3, work order 32-LS0751\O.7.

32-LS0751\O.7
Radford
2/8/22

AMENDMENT 3

OFFERED IN THE SENATE BY SENATOR HOLLAND
TO: CSSB 129(JUD), Draft Version "O"

Page 2, line 19, following "**(E)**":
Insert "**if applicable,**"

SENATOR HUGHES objected for discussion purposes.

1:57:25 PM
MS. DIPIETRO explained that Amendment 3 would insert "if applicable" in subparagraph (E). She explained that the bill would require the judge's ratings by law enforcement officers, attorneys, court system employees, and jurors. Amendment 3 would solve a specific problem since jurors and law enforcement officers do not rate appellate judges. She reported that jurors do not appear in an appellate court, and law enforcement officers do not appear as witnesses in appellate courts since

appellate courts do not have witnesses. In essence, this would allow AJC to provide all the survey information applicable to each type of judge.

1:58:21 PM
SENATOR HUGHES removed her objection.

CHAIR HOLLAND heard no further objection, so Amendment 3 was adopted.

CHAIR HOLLAND held SB 129 in committee.

1:58:38 PM
CHAIR HOLLAND announced the consideration of SENATE BILL NO. 23 "An Act relating to proposing and enacting laws by initiative."

[SB 23 was previously heard on 4/19/2021.]

1:58:56 PM
At ease

2:01:45 PM
CHAIR HOLLAND reconvened the meeting.

2:02:16 PM
SENATOR JOSH REVAK, Alaska State Legislature, Juneau, Alaska, speaking as sponsor, paraphrased the sponsor statement.

[Original punctuation provided.]

> SB 23 seeks to ensure ballot initiative language that appears before voters at the ballot box is the same as the language circulated during the signature-gathering phase and to restore the legislature's important role in the initiative process.
>
> Alaska's constitution details a very important right of our residents - the right to enact legislation through the voter initiative process. The legislature also has the right to enact legislation substantially the same as the proposed initiative thus removing it from the ballot.

2:03:30 PM
> The proposed ballot initiative language must be submitted to the State of Alaska for review. The

Alaska Department of Law reviews the proposed language then provides the Lieutenant Governor a recommendation whether to certify or deny the language.

The Lieutenant Governor's certification is a key step in the initiative process. Only once certification happens will the state print petition booklets for gathering voter signatures. The petitioner then circulates the booklets to gather signatures and submits those to the state for verification. Once signatures are verified, an initiative can be prepared for the ballot.

Per our constitution, some issues are off-limits for ballot initiatives and initiatives can only cover one subject. But while a cursory legal review of language occurs before the Lieutenant Governor's certification, it has sometimes been the case that further review finds constitutional concerns with proposed language. In those cases, a party can file a lawsuit to force the issue through the court system. This can happen simultaneous to the circulation of signature booklets.

2:04:09 PM

Under current law, if a court determines that language in a proposed initiative is unconstitutional and/or severed, an amended version of the language can appear before voters. This results in voters seeing a different initiative than the one they supported with their signature. Furthermore, if the courts revise/sever the language after the legislative review process, they deny the legislature its right to review the initiative as revised. The net effect of a court's severance is that an initiative can move forward to the voters that is substantially different than the initial version reviewed by the legislature.

SB 23 would rectify this situation. Under this bill, if a court determines that language in a proposed initiative is unconstitutional or severed, the Lieutenant Governor must reject the entire initiative petition and prohibit it from appearing on the ballot. Voters should be assured that language on the ballot has not changed from the language in the petition booklets supported with voter signatures and further, restores the legislature's right to review and enact

substantially similar legislation to stop an initiative from moving forward.

2:05:34 PM
SENATOR REVAK thanked members for their attention and willingness to hear SB 23.

2:05:57 PM
SENATOR HUGHES asked the sponsor to review the history of this bill. She wondered if the late Senator Chris Birch had previously brought this bill before the body during the last legislature. She stated her support for SB 23.

2:06:31 PM
SENATOR REVAK responded that then-Senator Chris Birch, now deceased, introduced Senate Bill 80, which passed the Senate in the 31st Legislature. He said he sponsored the bill this legislature because it is an important matter.

2:07:14 PM
CHAIR HOLLAND asked whether SB 23 was identical to Senate Bill 80.

SENATOR REVAK answered yes; that is correct.

2:07:20 PM
SENATOR HUGHES offered her view that to be true to the voters, the language for the ballot initiative at the general election should be the same as the language presented when the registered voter signed the ballot initiative pamphlet. She appreciated that Senator Revak continued working on the severability of ballot initiatives by introducing SB 23.

2:08:11 PM
CHAIR HOLLAND related his understanding that a memo from Legislative Legal Services dated April 23, 2019, was in members' packets. He asked the attorneys to respond.

2:08:33 PM
ERIC FJELSTAD, Partner, Perkins Coie, LLP, Anchorage, Alaska, deferred to Mr. Klein to initially respond.

2:08:41 PM
NOAH KLEIN, Attorney, Legislative Legal Counsel, Legislative Legal Services, Legislative Affairs Agency (LAA), Juneau, Alaska, reviewed the initiative process set out by art. XI of the Alaska Constitution. The process starts with an initiative

application filed with the lieutenant governor once signed by 100 sponsors. After conducting a legal review, the lieutenant governor can certify the application. Once certified, the initiative must meet specific signature requirements, and if satisfied, the initiative would be placed on the ballot to be considered at the next general election.

2:09:31 PM
CHAIR HOLLAND asked whether he could compare the initiative process to the legislative process. He related his understanding that one process must not be more restrictive than the other.

2:09:50 PM
MR. KLEIN explained the procedural differences. Bills and resolutions go through the legislative process and must be voted on and passed by both bodies. He characterized the initiative process as being vetted by the lieutenant governor and potentially the court before being placed on the ballot for voter approval or denial.

CHAIR HOLLAND asked whether he was familiar with a Legislative Legal Services memo of 4/23/2019 from Alpheus Bullard, Legislative Counsel to Senator Kiehl, relating to a constitutional issue raised by Senate Bill 80.

2:10:55 PM
CHAIR HOLLAND read from page 3 of the legal memo "Under SB 80, the people would not be able to exercise through the initiative, the same law-making power as the legislature." He referred to page 2, paragraph 1 related to the rules governing initiatives. It asserts that the initiative process may not be more restrictive than the [rules governing] the law-making power of the legislature. The subsequent language contains statutory language. "AS 01.10.030 specifically provides that provisions may be severed from a bill enacted by the legislature...." He stated that SB 23 addresses the severability of a bill before it is enacted. He asked if severability of a bill enacted by the legislature was comparable to severance before an initiative is enacted.

2:12:17 PM
MR. KLEIN referred to line 5 of SB [23], prohibiting a severability clause. It read, "An initiative petition may not contain a severability clause." He said it would essentially prohibit an initiative from having that same clause provided by AS 01.010.030 that is included in all legislation adopted by the legislature.

2:12:47 PM
SENATOR KIEHL offered his view that the legislature operates under more restrictive rules than the initiative process since the legislature cannot obtain a ruling from the courts before voting and passage of a bill. Yet, in the ballot initiative process, the people have a better opportunity because they cast their votes after the court rules on the constitutionality if a lawsuit ensues. Therefore, the severability of initiatives benefits the voter.

SENATOR HUGHES characterized this as comparing apples to oranges. She related her understanding that if a portion of an initiative is found unconstitutional, it does not stop the remaining language from going forward. The bill would require the initiative sponsors to go back and recollect signatures. However, it does not prevent an initiative from being placed on the ballot and becoming law. She concluded that the bill was not prohibitive or restrictive. She emphasized that when a person signs something, they agree to it in totality. She offered her support for SB 23.

2:14:48 PM
SENATOR REVAK stated that the intent of the bill was not to hinder the initiative process for voters. Suppose the initial paragraph of an initiative sounds compelling, and they sign the petition, but that language is later found unconstitutional and removed. In some cases, the final initiative on the ballot, once the unconstitutional language is removed, would be completely different than the initiative the registered voters signed. It's also conceivable that initiative sponsors might deliberately craft their language in anticipation that the courts will find it unconstitutional.

SENATOR REVAK noted that a lot of money is involved in the initiative process, that people make money gathering signatures on ballot initiatives, often at box stores.

2:16:18 PM
SENATOR MYERS responded to the timing when the courts weighed in on an initiative or for bills passed by the legislature. He did not view SB 23 as making the initiative process less restrictive than the legislative process. In terms of the legislature, when the legislature passes a law, and the court rules a portion of it unconstitutional, the severability clause allows the remainder to become law. Suppose an initiative is voted on and enacted. If someone sued after the fact and prevailed, the

initiative could be severed. SB 23 would prohibit severing the language at the critical juncture in the initiative process after registered voters sign the petition but before they subsequently vote on the initiative.

2:17:19 PM
CHAIR HOLLAND described the legislative process. When the Senate passes a bill, it goes to the House for consideration. If the House makes any changes, it must be returned to the Senate for concurrence. He offered his view that it should be the same for an initiative. Suppose the initiative sponsors collect signatures on one proposal, but the proposal is changed [by the court]. In that case, the sponsors may need to reaffirm the registered voter's approval on the revised language.

2:17:54 PM
SENATOR KIEHL offered to provide a better comparison. Suppose a bill was reported from the Senate Judiciary Committee with his "do pass" recommendation. He noted a bill must have at least one "do pass" recommendation to make it to the floor. If the Senate Finance Committee changes the bill, the bill will not go back to the Senate Judiciary Committee for him to re-evaluate it. His only option will be to consider the new language when the bill comes to the floor of the Senate for a vote. Comparably, when a voter signs a ballot initiative and the court removes unconstitutional language, the voter has an opportunity to reconsider the revised ballot initiative when the proposition is on the ballot at the next general election.

2:18:46 PM
MR. FJELSTAD stated that he became involved with this issue when then-Senator Birch, now deceased, raised concerns about the initiative process. He explained the genesis of Senate Bill 80. He pointed out the two constituencies: the registered voters who sign an initiative petition and the legislature's role. First, an issue of truth in advertising arises when voters sign a ballot pamphlet thinking they agree to 1, 2, 3, and 4. The legislature should give credence to it and not assume that if the court strikes item 4, it would be inconsequential to the voters. Second, the legislature's role arises under art. XI sec. 4, which reads, "...If, before the election, substantially the same measure has been enacted, the petition is void." This essentially means if the legislature enacts something similar to the language in the initiative, it will stop the initiative process. He characterized this as a fundamental right and role of the legislature. However, he acknowledged that it has been

difficult historically to enact something similar due to politics. Thus, most initiatives are not cut off and proceed.

MR. FJELSTAD highlighted that if the court takes the worst provision and severs it from an initiative, it could completely alter the political situation. The legislature might decide it could enact something similar. He explained that severability does not allow it. Under the current process, if the legislature considers ballot initiative version A, and the court finds a provision unconstitutional, it becomes a different ballot initiative version B. He related that version would not come back to the legislature for consideration.

2:21:39 PM
MR. FJELSTAD stated that the two drivers are the legislative review and truth in advertising. If the court finds a portion of a ballot initiative unconstitutional, the process must be restarted to allow the legislature to review the language that will go before the voters, not some version that the courts rewrote.

2:22:03 PM
MR. FJELSTAD turned to the statute mentioned earlier [AS 01.10.030]. He opined that the Alaska Constitution is higher than the statute that applies to the legislature passing laws. Finally, he suggested that there isn't any disincentive for initiative sponsors to draft language constitutionally. Instead, initiative sponsors continually overreach and rely on the courts to fix it. He predicted that this practice would continue, leading to more initiatives with constitutional defects. He suggested the remedy [in SB 23] is to require initiative sponsors to start over if the courts find some initiative provisions are unconstitutional.

2:23:20 PM
SENATOR KIEHL stated that historically, the courts have struck down some or all provisions of bills passed by the legislature. He asked what provides any disincentive for the legislature to pass bills with an unconstitutional but "flashy" part and just let the courts figure it out.

2:23:52 PM
CHAIR HOLLAND offered to refine the question. He stated that SB 23 relates to the placement of a severed initiative on the ballot, which implies that the initiative is not yet enacted. He asked whether it was appropriate for the court to rule on the law's constitutionality before it became law.

SENATOR KIEHL said that was a good question but a different one.

2:24:22 PM
MR. FJELSTAD offered to respond to Senator Kiehl's question. He said the legislature has the authority to enact laws that may or may not be constitutional. The legislature established a process to address this: if a portion of the legislation is found unconstitutional, those provisions should be severed, and the remaining ones become law.

MR. FJELSTAD stated that the genesis of an initiative is different since the people initiate the process, not the legislature. Second, the constitutional check vested with the legislature provides the legislature an opportunity to enact something that is substantially similar. He remarked that initiatives challenge the process because they are costly. The goal of SB 23 is to restore the checks in the process so that the initiative the legislature reviews is the one that will go before the voters, not some other version. Further, the legislature retains the option to pass something substantially similar and halt the initiative process.

2:26:08 PM
CHAIR HOLLAND asked if the legislature omits a section of the initiate, whether it would be considered substantially similar.

MR. FJELSTAD responded that the lawyers could debate what that means since there isn't a lot of authority on substantially similar. He said he considers it from a common-sense perspective. If the legislature reviews an initiative that members concluded would enact poor policy, it would be difficult for them to enact something substantially similar. He suspected that was why most efforts to cut off an initiative don't happen. However, if the potentially unconstitutional language is removed, it could create a different political dynamic, and there might be a will of the body to enact something.

2:27:23 PM
SENATOR KIEHL said he appreciated Mr. Fjelstad's concern for the legislature's political considerations, but the point of the bill is focused on constitutional considerations. He said he had heard phrases like a "completely different enactment" He asked what the courts consider a stricter standard, "substantially similar," or "unconstitutional," so the language must be struck down. He related his understanding that "substantially similar" means that the legislature cannot "turn the language 100 percent

upside down." He suggested that the two attorneys could help members better understand this.

MR. FJELSTAD deferred to Mr. Klein.

2:28:28 PM
MR. KLEIN responded that he has not analyzed whether the court's two tests would provide a broader or narrower standard. He was unsure whether the court had ever explicitly compared the two tests. The two tests the court applies are the same ones the court applies when reviewing "substantially similar" legislation enacted by the legislature to prevent an initiative from being placed on the ballot. He cautioned that this is different than the test the court applies when determining whether or not unconstitutional provisions can be severed. To apply the substantially same test, the court must first determine the scope of the subject matter or if the legislature has greater or lesser latitude, depending on whether the subject matter is broad or narrow. Next, the court must consider whether the general purpose of the legislation is the same as the general purpose of the initiative. Finally, the court must consider whether the means by which that purpose is effectuated is the same in both legislation and the initiative. Again, that's the test for determining whether legislation adopted by the legislature is essential under art. XI, sec. 4.

2:29:41 PM
MR. KLEIN said in the cases that the court has severed provisions of an initiative, it applied a three-part test based on the Alaska Supreme Court decision in McAlpine v. University of Alaska. He paraphrased a portion of the decision:

> "... when the requisite number of voters have already subscribed to an initiative, a reviewing court should sever an impermissible portion of the proposed bill when the following conditions are met: (1) standing alone, the remainder of the proposed bill can be given legal effect; (2) deleting the impermissible portion would not substantially change the spirit of the measure;[26] and (3) it is evident [*95] from the content of the measure and the circumstances surrounding its proposal that the sponsors and subscribers would prefer the measure to stand as altered, rather than to be invalidated in its entirety.

2:31:11 PM

SENATOR KIEHL stated that it makes the point that a completely different measure cannot be taken before the voters.

2:31:22 PM
At ease

2:31:40 PM
CHAIR HOLLAND reconvened the meeting. He asked the attorneys if the legislature's right to review initiatives under the Alaska Constitution, art. XI, sec. 4 supersedes art. XII, sec. 11. In other words, he asked whether art. XII was subject to the limitations of art. XI.

2:32:18 PM
MR. KLEIN said he was unsure. Further, he was unsure whether the court had ever addressed it. The Alaska Constitution, art. XII, Sec. 11 question was relating that the legislature can simply say that the initiative can't contain a severability clause. The analysis in McAlpine v. University of Alaska also implied the people's right to legislate via initiative includes severability. It includes the benefit that the court will sever rather than force the sponsors to go through the process again. While McAlpine was applying a narrow test for severability when an initiative meets that standard, the court is advocating for that to happen. It's saying that the people's right is worth justifying. It lends to the possibility that the people, the sponsors, have a constitutional right included in the right to initiate to have an initiative severed.

2:33:49 PM
CHAIR HOLLAND held SB 23 in committee.

2:34:33 PM
There being no further business to come before the committee, Chair Holland adjourned the Senate Judiciary Standing Committee meeting at 2:34 p.m.